SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941



No. 1015



WILLIAM H. EISENLORD, AS ADMINISTRATOR OF THE ESTATE OF MAUDE F. ADDIE, DECEASED,
*Petitioner,*

*vs.*

MAY ELLIS, MYRTLE CONLON AND LILLIE SCHUFELDT.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

---

BENTLEY M. McMULLIN,
*Counsel for Petitioner.*

# INDEX.

## Subject Index.



## Table of Cases Cited.



## Statute Cited.



## Texts Cited.

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

---

# No. 1015

---

WILLIAM H. EISENLORD, AS ADMINISTRATOR OF THE ESTATE OF MAUDE F. ADDIE, DECEASED,

*Petitioner,*

*vs.*

MAY ELLIS, MYRTLE CONLON AND LILLIE SCHUFELDT.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

---

William H. Eisenlord, as Administrator of the Estate of Maude F. Addie, Deceased, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Second Circuit entered on February 14, 1942 (R. 162), reaffirming a judgment of the United States District Court for the Northern District of New York entered on May 27, 1941 (R. 126), awarding to the respondents the sum of $4,849.10.

**Statement of the Matter Involved.**

There is no dispute as to the facts and only questions of law are involved.

Charles E. Addie, of Denver, Colorado, having insured his life for $5,000.00 by four life insurance policies issued by the Mutual Benefit Life Insurance Company of Newark, New Jersey, died at Denver on November 8, 1935. The beneficiary named in the policies was his wife, Maude F. Addie, who thereupon became entitled to the proceeds thereof. About November 20, 1935, she went to the insurance company's Denver agency and made verbal arrangements that the $5,000.00 should remain with the insurance company at interest payable to her during her lifetime, or so long as she had no need for the principal, and that upon her death this amount should be paid to Charles E. Addie's three sisters "it being expressly understood and mentioned to the insurance company that if at any time during her lifetime she had need for the money she would have the right to withdraw it and use it for her living" (R. 97, 102). Pursuant to these verbal instructions she executed, on November 20, 1935, at Denver, a written application or request (R. 118-119) which, omitting those portions not here material, was as follows:

> "The Mutual Benefit Life Insurance Company is hereby requested to retain the proceeds of Death Claim * * * on the life of Charles E. Addie, my husband, and make monthly interest payments thereon * * * to me, if living as the payments respectively fall due. * * * Immediately upon receipt at the company's office in Newark, New Jersey, of due proof of my death, the principal amount * * * shall be payable to May Ellis, Myrtle Conlon and Lillie Schufeldt, my sisters-in-law, share and share alike, or to the survivors or survivor of them, if they or any of them shall be then living, otherwise to my executors, administrators and assigns * * * I am to have the right at any time * * * to withdraw the amount upon which I may then be entitled to receive interest payments. If the right of withdrawal is so exercised,

the liability of the company shall thereupon cease and determine. * * *"

Pursuant to this application and request the company executed on November 30, 1935, and delivered to Mrs. Addie at Denver, an interest bearing certificate of deposit, denominated an interest income certificate (R. 120-121) which, omitting immaterial portions thereof, was as follows:

"It having been agreed that the proceeds of Death Claim * * * Life of Charles E. Addie, shall be retained by the company, the company will pay interest thereon in monthly instalments of $12.58 each, the first instalment being payable December 8, 1935. Such instalments will be payable to Maude F. Addie, wife of the said Charles E. Addie, of Denver, in the City and County of Denver, State of Colorado, provided she shall be living as they respectively fall due. * * * Immediately after receipt at the company's office in Newark, New Jersey, of due proof of the death of Maude F. Addie, the said proceeds, amounting to Five Thousand Thirty-three Dollars and Thirty-three cents, together with any unpaid accretions thereon * * * shall be payable to May Ellis, Myrtle Conlon and Lillie Schufeldt, sisters-in-law of Maude F. Addie, share and share alike, or to the survivors or survivor of them, if they or any of them shall be then living, otherwise to the executors, administrators or assigns of Maude F. Addie * * * Subject to the right of the company to require three months' notice in writing, Maude F. Addie may, at any time, withdraw the amount upon which she may then be entitled to receive interest payments. If the right of withdrawal is so exercised the liability of the company shall thereupon cease and determine. * * *"

During the remainder of Mrs. Addie's lifetime the company paid her the interest due on this certificate and the principal was not withdrawn. Mrs. Addie died in Colorado on September 10, 1940. Adverse claims to the fund were

made both by the petitioner, as administrator of her estate, and by the respondents, as the payees named in the certificate. The insurance company filed an action in interpleader, naming both the petitioner and the respondents as parties thereto, and deposited the $5,033.33, with interest, due under the certificate, with the clerk of the court to abide the outcome of the litigation. The fund less costs now amounts to $4,849.10, and has thus far been awarded to the respondents (R. 126, 181). It still remains on deposit with the clerk of the court under a stay of mandate pending this application for a writ of certiorari.

The petitioner has contended thruout this litigation that the foregoing transaction is a testamentary disposition of property ineffective because not made by a properly executed will. The language of both the application and the certificate follows forms of expression common to wills and, what is more to the point, these documents undertake to accomplish that which is done by a will. That is, they provide for retention of control and power of disposition during life, and for a gift over upon death. Furthermore, there is to be no transfer in any event unless one or more of the sisters-in-law survives Mrs. Addie. All rights under these documents are thus ambulatory; they become fixed and certain only upon Mrs. Addie's death. This ambulatory character is the essential element of a will, and, having the essence thereof, the transaction is, in legal effect, a will. It is conceded that the validity of the transaction is to be determined by the law of the State of Colorado (R. 33, 159) and that there has been no compliance with the statute of wills (R. 95, 118-121).

**Jurisdiction.**

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on February 14, 1942.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Sec. 1 (43 Stat. 938), the same being 28 United States Code (1940) Sec. 347 (a).

**Opinions Below.**

The United States District Court for the Northern District of New York rendered an opinion upon petitioner's motion for a summary judgment (R. 30-37), which opinion is not reported, and did not render an opinion upon the entry of final judgment (R. 126-7). The United States Circuit Court of Appeals for the Second Circuit rendered an opinion upon affirmance of the judgment of the lower court (R. 154), which opinion has not yet been reported. No opinion was rendered upon denial of the petition for rehearing.

**The Question Presented.**

The question presented is whether the gift to her sisters-in-law of the sum of $5,033.33 made by Maude F. Addie by means of the above-described request and certificate was testamentary in character and ineffective because not made by a validly executed will, in view of the fact that by the terms of the gift the sisters-in-law were to take nothing unless one or more of them survived her and in view of the fact that she reserved the right to withdraw the principal during her lifetime.

**Reasons for Granting the Writ.**

1. *There are special and important reasons therefor.*

In recent years many attempts have been made, often thru the use of trusts or similar devices, to find some means by which the normal and legal processes of administrating estates of deceased persons could be dispensed with. The present case now discloses that insurance com-

panies, apparently recognizing the profits to be realized from success in the endeavor, have attempted to work out a method by which funds can be left on deposit with such a company subject to full control by the depositor during his lifetime, to be paid over to named beneficiaries upon his death. The object which it is desired to accomplish is to retain the essential ambulatory character of a will, and yet avoid publicity, taxes, the claims of creditors and rights of inheritance. The interest income certificate in question is a recent legal invention which, until the present case, had never been construed by a reported decision. If it is now for the first time held to be valid a long step will have been taken toward abandoning the ordinary processes of administering estates; increasingly large sums will inevitably be concentrated in the hands of insurance companies for secret and extra-legal disposition upon the deaths of their owners. We believe that such a result would be contrary to sound public policy and that any means used to accomplish that result should, in the public interest, be examined with care.

2. *The United States Circuit Court of Appeals for the Second Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.*

A.

If the transaction involved a gift of property effective only upon death it was testamentary and void:

United States Supreme Court.

*Basket* v. *Hassell,* 107 U. S. 602 (1883).

Colorado.

*Taylor* v. *Wilder,* 63 Colo. 282, 165 Pac. 766 (1917).
*Smith* v. *Simmons,* 99 Colo. 227, 61 Pac. (2d) 589 (1936).

New York.

*Newman* v. *Dore,* 275 N. Y. 371, 9 N. E. (2d) 966 (1937).
*McCarthy* v. *Pieret,* 281 N. Y. 407, 24 N. E. (2d) 102 (1939).

New Jersey.

*Stevenson* v. *Earl,* 65 N. J. E. 721, 55 At. 1091 (1903).
*Reed* v. *Bonner,* 91 N. J. L. 712, 102 At. 383 (1917).
*U. S. Trust Co.* v. *Giveans,* 97 N. J. L. 265, 117 At. 46 (1922).
*Kirkpatrick* v. *Kirkpatrick,* 106 N. J. E. 391, 151 At. 48 (1930).
*American University* v. *Conover,* 115 N. J. L. 468, 180 At. 830 (1935).

Rhode Island.

*Sliney* v. *Cormier,* 49 R. I. 74, 139 At. 665 (1928).

Miscellaneous.

28 C. J. 624, 628, Gifts, Secs. 11, 43.
68 C. J. 611, 618, Wills, Secs. 234, 238.

B.

In order to avoid the effect of the foregoing decisions, and particularly the Colorado case of *Smith* v. *Simmons, supra,* which the Circuit Court of Appeals conceded would otherwise apply, the Circuit Court said (R. 160): "In the case at bar, however, *the title to the proceeds of the policies passed to the company,* leaving only contractual rights in Mrs. Addie and the sisters." (Italics ours.) No authority is cited for this statement, and we believe none could be. *It is directly contrary to the holding of this court in*

*Basket* v. *Hassell,* 107 U. S. 602 (1883)

and to

*McCarthy* v. *Pieret,* 281 N. Y. 407, 24 N. E. (2d) 102 (1939)

*Stevenson* v. *Earl*, 65 N. J. E. 721, 55 At. 1091 (1903)
*Reed* v. *Bonner*, 91 N. J. L. 712, 102 At. 383 (1917)
*Sliney* v. *Cormier*, 49 R. I. 74, 139 At. 665 (1928)

which we believe comprise all of the decisions on the question. In each of these cases a fund, which had been deposited at interest and over which the depositor retained the right to control and withdraw the same during his lifetime, was made payable to a named beneficiary upon the donor's death. Each of these cases held that the transaction was testamentary and void, upon the theory and for the reason that under such circumstances *the fund remained the property of the depositor or donor* and no title thereto passed during the donor's lifetime.

C.

The Circuit Court of Appeals endeavored to uphold the validity of the transaction on the ground that only contractual rights were involved and that a valid third party donee-beneficiary contract was created (R. 158), but in doing so was obliged to *expressly overrule* the only case in which the question had been squarely raised, namely,

*McCarthy* v. *Pieret*, 281 N. Y. 407, 24 N. E. (2d) 102 (1939).

For further comment, see footnote.*

---

* The holding in the *McCarthy* case is in accord with the general principles of the law of contract. In the present case the sisters-in-law were to receive the fund only if one or more of them survived Mrs. Addie and only if she did not withdraw the fund herself during her lifetime, which right of withdrawal she expressly reserved. The rights of the sisters-in-law were therefore as conditional and uncertain as they would be under a will. Assuming that the transaction was contractual and not testamentary, the contract would be invalid because of this uncertainty (*Williston on*

3. *The United States Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with an applicable decision of this Court.*

The decision of the Court of Appeals conflicts with *Basket* v. *Hassell*, 107 U. S. 602 (1883).

In that case a fund of $23,514.70 was represented by an interest bearing negotiable certificate of deposit on which the payee, H. M. Chaney, indorsed instructions that it should be paid upon his death to Martin Basket, reserving, however, control of the fund during his lifetime, and delivered the certificate to Basket. This Court, in that case, held that the transaction was testamentary in nature and void. In all essential particulars the facts in *Basket* v. *Hassell* are similar to those involved in the present case.

4. *The United States Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other circuit courts of appeals on the same matter.*

Under the theory that the transaction in question gave rise to a valid third party donee-beneficiary contract, which is the theory adopted by the United States Circuit Court of Appeals for the Second Circuit in this case, the decision

---

*Contracts* (1936 ed.), Secs. 24, 37, 43, 45). The opinion in the *McCarthy* case on this point seems to be based directly on the Williston text. Where title to the fund has been expressly transferred to a trustee, as was the situation in *In re Koss's Estate*, 106 N. J. E. 323, 150 At. 360 (1930), cited in the opinion below, there can be no withdrawal, so that the trustee's promise to pay is not made uncertain because of the reservation of that right. The Circuit Court of Appeals also seems to have overlooked *Townsend* v. *Rackham*, 143 N. Y. 516, 38 N. E. 731 (1894) and *Priester* v. *Hohloch*, 70 App. Div. 256, 75 N. Y. S. 405 (1902).

directly conflicts with the decision of the United States Circuit Court of Appeals for the First Circuit in

*Stevens* v. *United States*, 89 F. (2d) 151 (C. C. A. 1, 1937)

It appeared in that case that one Thomas McGovern, upon being admitted to the National Home for Disabled Volunteer Soldiers, signed an application for membership which, according to the terms of an Act of Congress, constituted a contract that upon his death without known heirs or legatees the title to his personal property should vest in the home's Board of Managers, subject to reclamation by his heirs or legatees within five years. A certain deposit, with interest accumulations thereon, owned by McGovern at the time of his death, was claimed both by his heirs and by the National Home. The court held that even the Act of Congress could not make the application contractual in nature; that it was testamentary in character and void for want of proper execution as a will; and that McGovern's heirs were entitled to the fund.

Under the theory that the transaction in question was a disposition effective upon death of an interest in property, which is the theory adopted by this Court in

*Basket* v. *Hassell*, 107 U. S. 602 (1883)

and in the other decisions cited in paragraph 2, B, above, the decision of the Circuit Court of Appeals directly conflicts with decisions of the United States Circuit Court of Appeals for the Ninth Circuit, namely:

*Ihihi* v. *Kahaulelio*, 263 Fed. 817 (C. C. A. 9, 1920)
*Pickens* v. *Merriam*, 274 Fed. 1 (C. C. A. 9, 1921).

5. *The United States Circuit Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.*

We confidently assert that prior to the decision of the United States Circuit Court of Appeals for the Second Circuit in this case no reported decision upheld the validity of a gift, effective only upon death, of a fund over which the donor reserved full control during his lifetime. All of the cases above cited hold that such a transaction is testamentary and void unless executed as a will; and there are other decisions to the same effect to which the limitations of this petition have prevented us from referring. To disregard such complete unanimity of authority would appear to be such an extreme departure from the accepted and usual course of judicial proceedings as to require review by this Court.

**Conclusion.**

The petition should be granted.

Respectfully submitted,

BENTLEY M. MCMULLIN,
*Attorney for Petitioner.*